

2002-34

>>> "Updike, Michael" <mupdike@secrestwardle.com> 08/25/03 10:20AM >>>

Dear Mr. Davis:

I am an attorney with a large litigation firm of approximately 70 attorneys, spread over five offices and two states. I've been the firm's senior appellate specialist since 1979 and have handled literally dozens of appeals each year since 1979 in both Michigan and federal courts for the firm. I therefore feel I am entitled to offer the following comments on the proposed amendments to MCR 7.204, 7.211, 7.212 and 7.216 presently being considered by the Supreme Court.

First, I have no objection whatsoever to the proposed amendments to MCR 7.204(H) and MCR 7.210. The proposed amendment to MCR 7.210(B)(1)(c) regarding transcript orders from appeals that relate solely to an order granting or denying summary disposition is, with all due respect to the Supreme Court, overdue.

I feel I must, however, and again with all due respect to the Supreme Court, strenuously object to the proposed amendments to MCR 7.212 that reduce the time for filing the appellant's brief and eliminate the provision allowing parties to stipulate to a 28-day extension of time to file their appeal briefs. I simply do not see where the one week reduction in time to file the appellant's brief will have any significant reduction in the Court of Appeals' backlog. The real problem is the internal delay within the Court of Appeals in processing cases once they are filed and briefing is complete. You cannot improve traffic flow on an expressway by merely increase the size of the on ramps.

Elimination of the provision that allows a 28-day stipulated extension for the filing of briefs is not only unfair to appellate practitioners, many of whom are seriously overworked already, but it will ultimately be counterproductive. If the 28-day stipulation provision is eliminated, I would anticipate a flood of "canned" motions for extensions of time for the filing of briefs. While Chief Judge Whitbeck may insist on a definitive showing of "good cause", what is one person's "good cause" is another's "minor inconvenience" or "necessary sacrifice". Thus, when motions for extensions are denied by the Court of Appeals, they will be promptly followed by emergency applications for leave to appeal to the Supreme Court, also "canned" and produced en masse by word processors. All this may generate a lot of additional motion fees for the Court of Appeals and the Supreme Court, but it will also substantially increase both fori's workloads on extraneous matters rather than matters of substance.

I can assure you that I try, and have consistently tried since 1979, to

avoid using 28-day stipulated extensions whenever possible, and I do believe I tend to use them less often than many appellate specialists. Still, there are times when they are unavoidable. Neither I nor any other appellate practitioners can control our workload--that's generated by other attorneys, and sometimes you run into a sudden and unexpected surge of appeals for no real reason. Also, some of us do have a life outside the practice of law. I'm responsible for the care of my 91 year old mother and my wife is responsible for the care of her 90 year old mother, who lives in Iowa. My wife and I have not taken a vacation in some years because of our family responsibilities. Other appellate practitioners have families that they, I assume, occasionally like to see.

Not do be unduly critical, but Chief Judge Whitbeck has stated that he would not consider a prepaid vacation "good cause" for granting an extension by motion if the proposed amendment to MCR 7.212 is adopted. As indicated above, an appellate practitioner basically has no control over when his or her brief is due. So does the Chief Judge want us to give up our personal lives for the sake of reducing the Court of Appeals backlog?

If the proposed amendment to eliminate the 28-day stipulated extension is adopted, I think it can be safely predicted that the quality of briefs submitted to the Court of Appeals will decline. I know I won't cut any corners, and I know many of my brother and sister appellate practitioners will not cut any corners either. But you will, as sure as the sun rises in the east every morning, have some who will succumb to the pressure and will submit briefs that neither help their clients or the Court of Appeals. Contrary to myth, the Gettysburg Address was not dashed off on the back of an envelope while President Lincoln was on the train from Washington to Gettysburg. He actually spent a considerable amount of time on it, going through several drafts in the weeks before the dedication of the cemetery at Gettysburg. The less time allowed for the filing of briefs, the less time will be spent on them, and quality, overall, will inevitably suffer. This may well end up generating more work for the Court of Appeals, through motions for reconsideration, and for the Supreme Court, through applications for leave to appeal.

I don't want to belabor this, but I've yet to see one iota of evidence from the Court of Appeals that the 28-day stipulated extension provision has contributed to the "warehouse" problem in the Court of Appeals in any significant way. I am also yet to see an explanation as to how the elimination of the 28-day stipulated extension will reduce, much less eliminate, the "warehouse" problem. Again, you don't fix a backup on the Lodge or the Ford by increasing the size of the on ramps.

For all of these reasons, as well as the ones that have been advanced by the many other appellate practitioners who have submitted comments to the

Supreme Court on this matter, I urge that the Supreme Court not adopt the proposed amendment to MCR 7.212 that would eliminate the 28-day stipulation for the filing of appellant and appellee briefs.

Very truly yours,

MICHAEL L. UPDIKE (P 28964)